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IN THE

Supreme Court of the United States

October Term, 1979.
No. 79-1073.

MUTUAL OF OMAHA INSURANCE COMPANY, a corporation,
Appellant,

vs.

MICHAEL EGAN,
Appellee.

On Appeal From The Supreme Court of California.

MOTION TO DISMISS APPEAL.

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MOTION TO DISMISS APPEAL.

Preliminary Statement.

The following pages of this Motion to Dismiss Appeal will affirmatively establish that Appellant Mutual of Omaha Insurance Company, a corporation, is not entitled to any relief in this Court and that therefore its ''appeal'' under 28 U.S.C. §1257(2) must be dismissed. Dismissal occurs because:

1. Statutes merely declarative of the common law are not subject to the appeals jurisdiction under 28 U.S.C. 1257(2) and may only be brought to this Court's attention by writ of certiorari;

2. The application of the state statute, which is the subject of appellant's complaint of constitutional infirmity, has furnished, at the appellant's demand, protection from and caused vacation of a punitive damage award;

3. The federal question was not timely raised;

4. Appellant Mutual of Omaha inflicted carefully calculated harm upon its policyholder Michael Egan;

5. Rigid California state standards governing the circumstances of award and amount of punitive damages supply ample protection to Appellant;

6. Appellant Mutual of Omaha is a fiduciary to Appellee Michael Egan under a significant duty to investigate and otherwise deal fairly with its policyholders as a matter of California public policy

Motion to Dismiss Appeal.

This motion is made pursuant to Rule 16(1) (a) (appeal not within jurisdiction of Court); (b) (no substantial Federal question is presented that was timely or properly raised or expressly passed on in the lower court); and (d) (the verdict and judgment of the lower courts were proper and work no hardship upon the appellant and there is no substantial federal question.)

Statutes Merely Declarative of Common Law Principles Are Not Subject to the Appeals Jurisdiction of 1257(2).

This Court is requested to take judicial notice of the fact that punitive damages are a creature of the common law of England, and that at the time of the separation of the colonies from Great Britain the common law of England prevailed as the law of each of the new states. Subsequently, as each additional state came into the Union, the basic principles

of the common law of England continued as the fundamental law of each new state. State constitutions so declared.

For example, Article XII, Section 1 of the California Constitution of 1849 stated:

> "Sec.1. All rights, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, and all laws enforced at the time of the adoption of this Constitution, and not inconsistent with, until altered or repealed by the Legislature, shall continue as if the same had not been adopted." (West Ann. Calif. Code)

Likewise, the California Constitution of 1879 contained similar provisions in Article XXII, Section 1 (West Ann. Calif. Code.)

One of the principles of the common law codified by the Legislature in 1872 (California Civil Code Section 3294) states:

> "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition o actual damages, may recover damages for the sake of example and by way of punishing the defendant."[1]

Thus, as early as 1872 the California Legislature had merely codified in statute the common law principle that upon a showing of an intent to cause injury a person can recover punitive damages. That the Legislature created no

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[1]A claim for breach of the implied duty of good faith and fair dealing is imposed by law and is not a creature of contract. Therefore punitive damages for violation of the implied duty rests upon tort principles, not contract principles. See *Comunale v. Traders and General Ins. Co.*, 50 Cal.2d 654, 328 P.2d 198; *Crisci v. Security Ins. Co.*, 66 Cal.2d 525, 58 Cal.Rptr. 13; *Silberg v. California Life Ins. Co.*, 11 Cal.3d 452, 113 Cal.Rptr. 711.

new principle of law that did not exist at common law or that it did not add to or change the content of the common law of California was made clear in the case of *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398, 419 where the court stated:

> "Our opinion did not dispose of appellant's contention that Civil Code §3294, which authorizes punitive damages for '. . . oppression, fraud, or malice. . .' is unconstitutional because it contains no standard by which to measure the punishment, nor any limitations as to the amount to be awarded. We find no merit in this contention. *A plaintiff's right to exemplary or punitive damages, when the defendant's conduct justifies the award, is generally accepted, and may exist even in the absence of statute. Some authorities have said that the right to such damages is as old as the right to trial by jury.* When allowable, the amount to be awarded lies within the sound discretion of the trier of fact (Citations omitted) but must bear a reasonable relationship to actual damages suffered (Citations omitted). Our statute does no more than recognize the right to punitive damages where the defendant had been found guilty of wrongful conduct showing fraud, oppression or malice. . . . Where, as here, its existence as a fact is supported by evidence in the record, we see no offense to the Constitution, and no deprivation of any constitutional right of appellant in committing the assessment of such damages, including the amount to be allowed, to the sound discretion of the jury." (Emphasis added.)[2]

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[2]*People v. Langtree*, 64 Cal. 256, 30 Pac. 813 and *In Re Sloan's Estate*, 7 Cal.App.2d 319, 46 P.2d 1007 hold a statute re-enacting the common law leaves unaffected those earlier principles.

At this juncture, the unsoundness of Appellant Mutual of Omaha's contentions become exceedingly clear — according to them every case arising under the common law, where it has been adopted by a state constitution or clarified by state legislative action, (one or both) is therefore a "statute" *entitling* the aggrieved party to a right of appeal under 28 U.S.1257(2).

The obvious burden that would be placed upon this Court by recognizing a right of review for every person claiming aggrievement by such a circuitous route would place an unbearable burden upon the Court.

Every automobile accident in every state in the Union, every slip and fall case on a banana peel in a supermarket — indeed every tort (see Conclusion, *infra*) under this theory of the appellant would entitle a case to the dignity of review as a matter of right.

Such is not the law. *Burton v. Wilmington Parking Authority*, (1961) 365 U.S. 715, 721, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 establishes the principle that a statute which is merely declarative of the common law is not the type of statute contemplated by 28 U.S.C. 1257(2).

In that case, the plaintiff brought suit in state court claiming that a city which operated a parking garage systematically refused to serve the persons who were members of minorities.

The Delaware State Supreme Court found that a statute which gave the restaurant operator the right to refuse service to anyone did not involve any type of state action, only private action, and further that the statute in question merely confirmed a common law result.

This Court dismissed the appeal.

Likewise, the result in this particular case is merely the recognition of the right by plaintiff to common law damages

known as punitive damages, which happens to have been codified by the State Legislature of California but which also otherwise exists independently of statute (*Toole v. Richardson-Merrell, supra*).

It is to be noted that the California Supreme Court in its opinion specifically referred to *Toole v. Richardson-Merrell* as well as to Civil Code §3294 — thereby indicating that punitive damages is a creature of the common law codified in California with the Legislature providing that there must be fraud, malice or oppression prior to their award.

Thus, since C.C. §3294 is merely declarative of the common law, a right of appeal under §1257(2) does not lie.

Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 reiterates this proposition.

The dissent in *Gomez* noted that the case came to the Supreme Court under a right of appeal under §1257(2) — and the dissent felt ''cheated'' by the fact that no true statute of the State of Texas was directly involved in the appellant's claim of denial of Federal constitutional rights. In fact the dissent felt so strongly about that and the nebulous phrasing of the claimed denial of other Federal constitutional rights, absent the proper statutory reference, that it would not even have treated the appeal as a petition for writ of certiorari as the majority did.

In *Gomez* the State Legislature of the State of Texas had adopted an elaborate statutory scheme providing for the right of child support from the natural father upon the birth of the child, and extending such rights to the child even after the divorce of the parents. It was conceded by all parties that the statutory scheme protected only legitimate children. The statutes in no way augmented, supplemented or changed the common law of Texas that illegitimate children had no support rights from their natural fathers. Under this state

of circumstances the majority conceded that there was no right of appeal and it was not the statute that deprived the illegitimate child of the constitutional rights but, on the contrary, it was the Texas common law that deprived them of constitutional rights.

Having recognized the basic proposition that a claim that the common law deprives persons of a federal constitutional right can only be reached by writ of certiorari, not appeal, the majority of the court then proceeded to treat its notation of probable jurisdiction for certain ''non-appealable'' issues as being the grant of a writ of certiorari.

The Court was careful to also note that the appellee State of Texas had specifically asserted no prejudice, and affirmatively stated that it was ready to meet any constitutional issue that the Court found in the case.

The tenor of the California Supreme Court opinion makes it clear that its decision is basically enforcement of common law public policy and ''the special relationship between the insurer and the insured illustrates the public policy considerations that may support exemplary damages in cases such as this.'' (California Supreme Court Opinion, Mutual's Jurisdictional Statement, p. A9.)

For example, it notes that there is a special fiduciary relationship between the policyholder who buys a policy of insurance and the insurance company. This common law created fiduciary duty adds impetus to the enforcement of a strong public policy of the State of California to support injured, seriously disabled policyholders at the expense of the insurance companies, as contracted for by the insurance companies, and not the public coffers.

Thus, the whole essence of the concept of the fiduciary duty coupled with the statutory recognition of this common law right to punitive damages puts in the hands of the private

policyholder powerful tools in insuring him the benefits due him.

It has long been noted that the Department of Insurance of the State of California lacks any significant power to obtain policy benefits for policyholders. Their powers are limited generally to drafting of broad prospective regulations governing insurance, and not the remedying of past individual wrongs. *Greenberg v. Equitable Life Assurance Society of the U.S.*, 34 Cal.App.3d 994, 110 Cal.Rptr. 470; *Shernoff v. Superior Court*, 44 Cal.App.3d 406, 118 Cal.Rptr. 680; Seminar on Insurance, A. Knachadour, Chief Legal Counsel, Department of Insurance, State of California, February 26, 1977, sponsored by the California Trial Lawyers Association.

The Application of the State Statute, Which Is the Subject of Appellant's Complaint of Constitutional Infirmity, Has Furnished the Appellant Protection.

Indeed, as explained *infra*, Appellant Mutual of Omaha fails to tell this Court that it is the very statute challenged (California Civil Code §3294) that furnished Appellant Mutual of Omaha substantial and material protection against the so-called unbridled discretion of the jury.

What the appellant does not tell this Court is that over a period of many years, in the State of California, a relatively rigid body of law has developed surrounding the awarding of punitive damages.

The application of these principles strictly defines fraud, malice and oppression. Likewise, there has developed definite, substantive tests for determining whether the amount awarded as punitive damages is excessive.

In fact, the application of these standards has sent the issue of the amount of punitive damages back to the trial court for further trial and determination.

It is difficult for the appellant to realistically advance the proposition that this statute, as applied to the appellant, has unconstitutionally deprived it of any rights whatsoever.

A review of the appellate history of this case shows that the appellant has invoked these very principles, discussed *infra*, to decry the imposition of punitive damages upon itself.

Effectually speaking, the appellant has relied upon this extensive body of law to relieve itself of the payment of this judgment.

It has long been clear that:

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another. (Citations omitted.) Besides a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." *Dahnke-Walker Milling Company v. Bondurant*, (1921) 257 U.S. 282, 289, 42 S.Ct. 106, 108, 66 L.Ed. 239, 243.

It is well-settled under California law that the size of a punitive damage award furnishes a proper basis for an attack upon it in the Appellate Court as being excessive as a matter of law, and that this remedy is available for punitive damage awards whether under the common law per se or C.C. §3294. *Forte v. Nolfi*, 25 Cal.App.3d 656, 102 Cal.Rptr. 455; *Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855.

Appellant in California State court sought, and in fact received (by reversal of the punitive damage judgment) the protections afforded a litigant under C.C. §3294.

At this late date it is antithetical for the appellant to now claim that the application of §3294, as applied to Appellant Mutual of Omaha, is "unconstitutional".

In fact, an examination of Mutual of Omaha's opening brief filed in the intermediate Court of Appeal in the State of California shows that 50 or more pages, out of a 113 page brief, were devoted to arguments that the award of punitive damages was excessive as a matter of law (tested by the standards developed under both case law and C.C. §3294), and that the jury instructions failed to properly communicate to the jury the full extent of the protections afforded under these laws.

At the time that appellant Mutual filed its "Reply Brief for Appellant Mutual of Omaha Insurance Company" (its last brief in the intermediate Court of Appeal) it again devoted tens of pages to the same proposition.

Likewise, when it filed its "Petition for Hearing" in the California Supreme Court Appellant sought and was granted the benefits of decisional law interpreting C.C. §3294.

At each instance Appellant Mutual of Omaha sought the benefits of the decisional law surrounding C.C. §3294.

And received them.

Mutual of Omaha does not deny that at this point it is not under a compulsion to pay Appellee Michael Egan one dime in punitive damages — and that under its view of the decision might never have to for it claims that the appellee's fundamental right to punitive damages must be retried in the trial court, and that he must reprove malice, fraud, intent to harm, etc. all over again.

Since Appellant Mutual has sought, and received the protection of the challenged statute — C.C.§3294 and did not even consider raising the issue of constitutionality until it was too late, the principle of *Memphis National Gas Company v. Beeler*, 315 U.S. 649, 650-651, 62 S.Ct. 857, 859, 86 L.Ed. 1090 applies:

> "It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal."

An examination of the trial court briefs below will show that appellee Egan, because of the untimeliness (*Blackman v. McCoy*, 169 Cal.App.2d 873, 339 P.2d 169) of the appellant's constitutional challenge, never responded to it in the courts below, beyond string-citing a long line of California cases holding punitive damages constitutional. Appellee never responded to the voluminous brief submitted at the last minute to the California Supreme Court on the subject. Nor did that court treat appellant's contention beyond doing what appellee Egan had done — string-citing the cases upholding the constitutionality.

To now force Appellee Egan (who is not in an economically strong position because of his injury) to meet this challenge at this late date would be prejudicial to appellee and force him to undertake a vast amount of costly legal research on defendants' esoteric claims. Out of the hundreds of hours spent on this case, appellee and his counsel have spent less than two hours meeting appellant's spurious claim. Prejudice definitely would result to appellee. (*Cf. Gomez v. Perez, supra.*)

The "Federal Question" Is a Johnny-Come-Lately Argument That Was Not Raised at the Trial Court Level.

Michael Egan, appellee-plaintiff, filed his Complaint on February 22, 1973 against Appellant Mutual of Omaha Insurance Company. That Complaint sought punitive damages.

Appellant Mutual of Omaha answered the Complaint, along with the individual defendants' named therein, and

no defendant demurred, or made a motion to strike punitive damages on any ground, let alone on the ground that they were unconstitutional.

Ultimately, the case came to trial slightly more than a year later. *At no time during the course of trial did any defendant contend that punitive damages were unconstitutional.*

No party filed any trial brief with the court so contending.

In California there are standard jury instructions contained in the "Book of Approved Jury Instructions" (West Publishing Co. 5th Ed.) which are given to the jury. To the extent that the Book has no jury instructions, they are drafted by the parties and submitted to the trial judge. Regardless of the source of the instructions *i.e.*, whether they are in the Book or submitted by counsel, no jury instruction is given until counsel and the court have a discussion as to the applicability or non-applicability of a requested instruction. In the event of failure of agreement, the court makes the decision as to which instructions are given. If the other side's instruction is given, it is deemed excepted to. In this particular case at no time did any defendant object or advance in the trial court the issue that punitive damages are unconstitutional. To the contrary, the actions of the defendant were that they were constitutional — the defendants themselves offered numerous jury instructions on guides for the jury in determining punitive damages. Some of those were given.[3]

Offering instructions on an issue that the party claims improper for the jury waives the error, as does failure to affirmatively plead it as a defense in the answer. Witkin,

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[3]Clerk's Transcript 484, 522. Other instructions offered by the defendant on the subject were refused as redundant or incorrect. (CT 537, 538, 539, 540, 544, 546, 547, 548, 549, 550 and 551.)

California Procedure, 2nd Edition (1971) pp. 2510-2511, and pp. 4257-4258; *Fletcher v. Western Nat. Life Ins. Co.*, 10 Cal.App.3d 375, 407, 89 Cal.Rptr. 78, 98; *Miller v. Dollar Steamship Lines*, 19 Cal.App.2d 206, 211, 64 P.2d 1163, 1166.

None of these instructions, or any argument carried on during the trial even hinted at the appellant's now made claim that punitive damages are unconstitutional.

In fact, when the appellant filed its motion for Judgment Non Obstante Veredicto, the unconstitutionality argument was not even mentioned. This was on December 11, 1974 — almost a year and one-half following the filing of the original lawsuit!!!

In fact, the first hint ever that the appellant indicated that it would make this argument was when it filed some of the papers in support of the motion for new trial on December 23, 1974 where it stated it "*will later* argue" about unconstitutionality (emphasis added).

In fact, appellant barely managed to deliver the argument in support of unconstitutionality until January 3, 1975 — a couple of days before oral argument on the new trial motion.

Appellant's contention was clearly late.

California Code of Civil Procedure §657(7) states that "error in law, occurring *at* the trial *and* excepted to by the party making the application" is a ground for granting a new trial (emphasis added).

But, the appellant never excepted to this "error" *at* the time of trial. It waited until *after* the trial.

Further, California Code of Civil Procedure §659a states that within ten days after serving the notice of motion for new trial, the moving party must serve all affidavits upon the adverse parties to be used in support of a motion for

new trial. No affidavits were served supporting appellant's just-raised contentions of unconstitutionality.

Such lateness accounts for the ignoring of the claim by the trial court (Jurisdictional Statement Appendix B); the ignoring of the so-called "issue" by the Court of Appeal in this intermediate-level appellate opinion; and for the short shrift given it by the California Supreme Court (other than its notation that constitutionality of punitive damages had long been upheld in a line of cases (both State and Federal)). (Jurisdictional Statement Appendix A, pp. A8-A9.)

There is no validity to the further claim of Appellant Mutual (Jurisdictional Statement, p. 5) that:

> "At trial, appellant unsucessfully sought to limit the standardless and chilling application of §3294 during argument on proposed jury instructions. See . . . Cl. Tr. 552."

This simply is not true and is an example of appellant's virtual concealment from this Court of its cold, calculated acts aimed at depriving appellee Egan of his substantial rights under his insurance policy.

Defendants' instruction referred to reads:

> "An insurance company is privileged, in pursuing its own economic interest, to assert its legal rights in a *permissible way if it has a good faith belief that such rights exist. If it has such a good faith belief,* the insurance company is further privileged to communicate its position to its insured even though it is substantially certain that by so doing it will cause him emotional distress. (Cl.Tr. 552)". (emphasis added.)

The appellant, by this instruction, would have put the issue of appellant's breach of its duty of good faith to the jury as a question of fact.

But by This Time, the Trial Court Had Ruled That Appellant Had, in Bad Faith, Denied Egan His Benefits Under the Policy. Mutual Had Admitted Liability (as a Practical Matter) by This Time.

The trial court determined, as a matter of law, that Egan had been unjustifiably denied his benefits, and that the insurance company knew or should have known it.

In other words there was no question of fact for the jury to decide on liability for compensatory damages; only the amount was left as a jury issue.

There was never a legitimate position that the insurance company had that it could communicate to its insured that would, at the same time, cause the insured emotional distress, and be privileged because the insurance company acted in bad faith from the start.

The facts in this case were so clear cut (and as noted in the next section *admitted by appellant's counsel*) that nothing in them gave rise to such privilege.

But for the lack of the necessary facts to cause application to this particular case, the appellant's proposed instruction is a perfectly valid principle of California law.

Fletcher v. Western National Life Insurance Company, 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78 holds as a principle of law, that if an insurance company has justified doubts about its policyholder's entitlement to benefits it may communicate those doubts to the insured even though it may cause serious and substantial harm to the insured.

But here, the trial court (which was sustained both by the intermediate Court of Appeal and the California Supreme Court) found that the Appellant Mutual of Omaha had no reasonable doubts as to Appellee Michael Egan's entitlement to benefits.

Since the trial court thus directed a verdict for Appellee Michael Egan on the issue of his right to some compensatory

benefits (to be determined in amount by the jury) (as opposed to punitive damages) the foregoing instruction has no sort of meaning as attributed to it by appellant.

It is clearly an effort by appellant to bootstrap its way to the necessary position that it timely raised the federal question.

Appellant Mutual of Omaha Inflicted Carefully Calculated Harm Upon Its Policyholder Michael Egan.

In 1962, Mr. Michael Egan purchased the disability income insurance policy which became the subject of this litigation. He purchased the policy, which would pay him $200 a month in the event of total disability, for protection for himself and his family because of his hazardous occupation as a roofer (RT 91, lines 22-25).

Essentially, the policy provided for lifetime total disability benefits if the disability was the result of an *accidental injury* but only three months of benefits if a total disability was a result of a nonconfining *sickness*. (A confining sickness also provided lifetime benefits.)

On May 11, 1970 Mike Egan, a Mutual of Omaha policyholder, stepped on a ladder, it broke, and he fell one story to the ground (RT 95, lines 16-23). Mutual verified the truth of this (RT 159, lines 17-20), and opened the file as an *accident* claim (RT 160, lines 8-11; 237 lines 10-12).

The policy expressly promised (CT 32) **"To serve with justice and integrity those whose protection has been entrusted to our care. To support right principles and oppose bad practices in health and accident insurance. To develop character, ability and knowledge. To value honor above profit. Thus to be faithful to ourselves and to those we serve."**

Egan had filed his claim for benefits on approximately May 20, 1970 (RT 102, lines 23-25). Despite its promise

Mutual made no payment, which required Egan to travel to Los Angeles with a friend to personally ask for payment. Upon his arrival he was taken to see Mutual's managing agent, Mr. Segal. The first payment for the accident was then made at the end of September 1970 (RT 103, lines 10-19).[4] Segal promised regular checks (RT 104).

Egan's next contact with Mutual of Omaha was in November 1970 when Thomas McEachen, "Manager of Benefits Department" for Mutual of Omaha, stopped by Egan's house and insulted him, laughed at him, and finally called him a fraud (RT 106) in front of his family. He refused to pay Egan and told Egan he would get no more benefits (RT 107). But on February 5, 1971 McEachen wrote to Egan enclosing a $626.66 draft stating this "represents full payment of benefits" under the policy. All payments up to this point were coded and classified as payments on an "accident" claim.

Around the first day of March 1971 Egan underwent back surgery due to the accident (RT 114, lines 6-9, 275, lines 1-5).

About May 6, 1971 Mutual had consciously decided to convert Egan's "accident" to a "sickness" (CT 299-300). Approximately three weeks before this conversion Mutual knew that Egan had had his back operated on and that it was now likely to be a long-term disability. The post-surgery form received on April 15, 1971 (CT 295) asked the doctor to fill in if it was due to "sickness" or "injury." The portion relating to sickness was left blank, the portion relating to injury was filled out. At CT 296 it was stated on the form by the doctor that the patient had "increasing

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[4]This was nearly a five month delay. In the court below Mutual characterizes this as an "on-the-spot" payment; despite this being approximately five months' post-accident, they only paid him for three months.

difficulty over the last four to five years with several different accidents.''

After deciding to convert the claim to a sickness, Mutual had its corporate agent stop by appellee's house in mid-May 1971 (RT 588, lines 4-6) to tell him he was no longer entitled to benefits because he was disabled due to sickness (RT 117, lines 9-10, 23-28, 118, lines 1-9, 161, lines 25-28, 162, lines 1-13). If Egan was disabled as a result of sickness, and not accident, the company would save, over $40,000 in benefits (RT 253). Appellant's counsel figured at trial *exactly* $45,600 would be saved by this decision. (RT 900).

On the subject of this termination the verbatim testimony of the appellant and its corporate agents is now set forth:

Mr. Romano, the home office analyst who was present when the wrongful conversion took place, said when questioned by Egan's counsel:

''Q. Sir, *AT THE TIME* a person such as yourself, being an experienced analyst, *would know that that type of action would be wrong;* is that correct?

A. *That's correct.*'' (RT 427, lines 8-11). (emphasis added.)

''Q. Can you tell us why action was taken to terminate Mr. Egan's benefit without consulting one medical doctor?

A. No sir, I can't.

Q. *That's quite improper, isn't it?*

A. *It would be wrong, I believe, yes.*'' (RT 426, lines 19-23).

''A. Well, I did not make the decision.

Q. Who made it?

A. I assume Mr. Segal made it.

Q. You with him at the time (*sic*)?

A. That's correct.'' (RT 428, lines 22-26).

''Q. [Reading from the claims file, it said] . . . When this [a Retail Credit Report] is received, further contact will be made with policyholder to settle and close on basis of sickness! Now, that got back to the home office, didn't it?

A. That is correct.'' (RT 423, lines 22-26).

Romano further testified at RT 423, lines 23-25 that he ''rode with Jon Segal to secure a copy of the medical records and checked the Workmen's Compensation records.'' And at RT 424, lines 25-26 testified that ''with the information we developed, it did raise a question of *sickness versus injury*.'' As shown, a fabricated distinction.

Segal testified:

''Q. Are you [Mr. Segal] prepared to *concede at this time that the company did not handle Mr. Egan's claim properly in May of 1971?*

A. *Yes.*'' (RT 322, lines 23-25).

''Q. I think you have testified — well, let me ask you.

Having looked at the file and having been sitting here for the earlier part of the day and answering questions, do you have any opinion as to whether or not this claim was handled properly on the 19th of May, 1971?

A. Well I have pondered this considerably, and I feel that it could have been some more handling done at that time. (sic)'' (RT 321, lines 7-14).

''Q. Wouldn't that have been the proper thing to do [check with the operating physician as to the cause of disability], sir?

A. I believe so. (RT 250, lines 20-22). . . . [B]ut certainly further investigation should have or could have been done.'' (RT 251, lines 3-5).

''Q. If you had it to handle at the present time,

and if you have any opinion, how would you handle it?

A. Well, for sure I would make certain that the doctors were contacted and, perhaps, an independent medical examination would be suggested and done, perhaps.

And further review by a medical department, by our medical department, claims department.'' (RT 371, lines 15-21).

Agent McEachen testified:

''Q. Do you feel that action by the company was wrong? (RT 371, lines 8-9).

THE WITNESS: There could be a question, yes. I meant, could be more information than may be necessary in order to — but this is after — this is hindsight, I mean. Truly — I mean, maybe I am kinda dense.'' (RT 371, lines 16-19).

Willard Gustin, a Vice President and Manager of Continuing Disability Department, brought from Omaha, Nebraska testified:

''Q. On May 11 someone now back at Mutual of Omaha, number one, knew that Mr. Eagen had undergone surgery as a proof of loss from the doctor came in, and then, number two, agent Jon Segal was about to convert this to a sick.. ss claim?

A. *Somebody saw this. There isn't any doubt about it, because there is an initial here.*

Q. Okay. Well, now, this conversion from an accident to a sickness would be something of importance, would it not?

A. Yes.'' (RT 588, lines 20-28). (Emphasis added.)

''Q. *Conversion from an accident claim to a sickness claim, would in effect deprive a policyholder out*

of lifetime benefits.

Do you understand that?

A. *Yes.*'' (RT 604, lines 17-21).

''A. And your question was, should it [Egan's claim] have been set up as long-term disability then? Right at that very time [that Egan was terminated from payment under his policy]? If it would have been seen by an analyst, absolutely should.

Q. And there is no doubt that at that time it should have been seen by an analyst?'' (RT 606, lines 16-28).

''A. In my opinion it should have.'' (RT 607, line 1).

Gustin then tried to explain that a slip-up may have occurred and maybe Egan's file got lost in a corporate ''crack.'' But when questioned about a California Department of Insurance inquiry he agreed that some correction should immediately have taken place!

''That letter [from the California Department of Insurance] that you showed me is here [in the file], July 7, 1972, that should have gone to a member of the staff of the department that handles this type of letter and *something should have been done, I agree. I agree with you 100 percent.*'' (RT 609, lines 1-4) (Emphasis added).

''Q. Certainly as of that date, even if the file fell in that deep wide crack, someone would be obliged to pick it up and analyze it and see what happened, is that right?

A. It would appear so.'' (RT 598).

Appellant's Attorney in final argument told the jury, ''I think compensation is clearly warranted, but I think that is enough'' (RT 878, line 28, 881, line 1). And later on said, ''Ladies and gentlemen I think that's fair compensation. No one is trying to say that the decision was right. Everybody

has said it was wrong'' (RT 901, lines 22-24, 900). And Mr. Doutre, defense trial attorney, in final argument stated that all Mutual employees, well ''they thought it was a wrong decision. Well, fine. We say that. . . .'' (RT 903, lines 11-12).

Mutual's attorney Wild, in his argument before the judge on the new trial motion stated,

> ''. . . I believe that every Mutual of Omaha witness who testified in the case testified that in retrospect, looking back, further follow-up was probably in order or was in order in that the decision at the time that it was made was not based upon enough information.''
>
> THE COURT: ''I believe that they were unanimous in that.''
>
> Mr. Wild: ''I believe they were, too.'' (RT 990, lines 21-28, 991, line 1).

On this basis of the foregoing testimony, the trial judge found that Mutual *only* violated the duty of good faith and fair dealing (CT 481) and reaffirmed (after careful actual review of the entire transcript (RT 968, lines 20-27) the correctness of his decision to remove from the jury the issue of good faith Mutual attempted to inject by the previously quoted proposed instruction.

The trial judge *DID NOT* direct a complete verdict for the appellee as to all defendants.

As to Mutual of Omaha, he left to the jury the question of whether this breach of the duty of good faith and fair dealing caused the appellee any compensatory damages (both as to the amount and their nature, that is, whether Egan was entitled to future policy benefits because of continuing disability, and whether he deserved any emotional distress damages whatsoever) and he also left the question

of whether the appellant's acts were of such sufficient evil to warrant punitive damages, and if so, the amount of the punitive damages.

Rigid State Standards Governing the Circumstances of Award and Amount of Punitive Damages Supply Ample Protection to Defendants.

Appellant Mutual of Omaha's counsel should be reprimanded for cunningly misciting the case of *Brewer v. Second Baptist Church,* 32 Cal.2d 791, 801, 197 P.2d 713, at 719. At its Jurisdictional Statement (p. 15, footnote 18) it quotes the *Brewer* decision as stating ''the granting or withholding of the award of punitive damages is wholly within the control of the jury and *may not legally be influenced by any direction of the court.*'' (Appellant's emphasis).

Appellant's placement of the ''period'' after the word ''court'' in the above quotation gives the distinct impression that that is a complete sentence of the California court.

This is false. The appellant has purposely misled this Court by leaving off the rest of the sentence that reads ''that in any case the plaintiff is *entitled* to them.''

In fact, the whole paragraph from which that sentence comes is directed to the proposition that a plaintiff is *never entitled* to punitive damages no matter how gross or evil the conduct of the defendant.

That paragraph noted that in California once a plaintiff shows the commission of a tort then plaintiff is entitled, as a matter of right, to *compensatory* damages.

The court held, however, that an entirely different rule prevailed in the situation of punitive damages — no matter how evil or wrongful or malicious the conduct shown by the plaintiff, he is never *entitled* as a matter of right to punitive or exemplary damages.

Likewise, no court may ever direct a verdict for the award of punitive damages in a jury trial.

And that is exactly what the Supreme Court of California was saying in the sentence prior to its butchery by Appellant Mutual.

Mutual also left off the next succeeding sentence that says "upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded."

And in this case (CT 486) the jury was instructed "the law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice."

The determination of whether the jury acted under passion or prejudice is controlled by approximately six standards. The California Supreme Court in the *Egan* opinion referred to its recent decision in *Neal v. Farmer's Insurance Company*, 21 Cal.3d 910, 148 Cal.Rptr. 389.

The undersigned, as amicus on behalf of the California Trial Lawyers Association, urged the court to collect together and review all applicable standards for review of punitive damages in one case. The court apparently took the suggestion, and so did at 21 Cal.3d 927-928, 148 Cal.Rptr. 399.

A brief examination of those factors now follows.

A. The First Major Standard of Judicial Review Available to the Court Is the "Exemplary" Standard, Sometimes Called the "Deterrent" Standard.

Public policy recognizes that certain types of conduct represent a greater threat to society than do other types of wrongful conduct, and the need for large awards is greater or lesser, according to the widespread fallout of such acts among the general public.

In certain cases, involving an emotional, sudden utterance of a slanderous statement by one individual to another, with few third parties present, the court recognizes that there is

less of a public danger of repetition and widespread harm than in cases where the conduct is more deliberate and where it represents the threat of similar conduct to vast members of the public. In the area of insurance, where the types and forms of insurance are extremely limited, the right of the public to count on fair treatment from insurance companies selling such policies becomes paramount. As the Court noted in *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566, 566, 108 Cal.Rptr. 480, 491, "the insurer has insisted upon and assumed high fiduciary obligations by the express terms of the only type of insurance an insured can buy."

The possibility that a company such as Mutual may attempt to add to its billion dollars in assets by classifying clearcut accidents as sicknesses, particularly when such actions were deliberate, done by high-ranking managerial employees and continued over a long period of time, represents a threat to the public's financial security that is staggering in its national implications.

This is particularly so when done by an extremely large company after point blank warnings by the State Insurance Commissioner that it is treading on very thin ice, and after being warned prior to actual suit that punitive damages will be sought if a lawsuit is filed.

Such a callous attitude by an extremely large company to disabled individuals of small means encompasses very many people indeed.

A need for an example or deterrent in certain cases is objectively apparent, based upon the arithmetic scope of the company itself (a completely objective fact) and its interrelationship with the arthmetic scope of the industry within which it operates (again, a completely objective arthmetic fact). In such a situation, there is no vagueness. There is only discretion and judgment in the trier of fact. This above

principle of deterrence is set forth in many cases — *Ward v. Taggart*, 51 Cal.2d 736, 336 P.2d 534; *Hagen v. Gallerano*, 169 A.2d 186; *Wetherbee v. United Insurance Company of America*, 265 Cal.App.2d 921, 71 Cal.Rptr. 769; *Cf. Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855.

Appellant Mutual is being punished for the magnitude of the wrong perpetrated, and its misuse of corporate wealth. The cases are clear that the imposition of a fine by a civil jury by a preponderance of the evidence test does no violence to the constitution. *United States v. Regan*, (1914) 232 U.S. 37, 46-49, 34 S.Ct. 213, 58 L.Ed. 494.

Nor is there any allure to the appellant's argument that it is really the ''policyholders'' that are being punished because it is a mutual insurance company owned by the policyholders. Any money appellant Mutual of Omaha would pay to the appellee does not come from the pockets of Mutual policyholders. The mutuality of this appellant is sham. Appellant keeps all the money and never pays cash dividends to its policyholders. This was established by appellant's counsel at the trial (RT 725-726). Its refusal to pay cash dividends clearly explains how it has amassed its corporate wealth.

The conclusion that the insurance company will be driven from the field of insurance by application of the deterrent standard is somewhat flip. Logically, it is advocating that the insurance companies become a law unto themselves and opts for a situation of irresponsiblity reminiscent of that which lately occurred in the nation's capital.

In reality, when the insurance company does what it is supposed to do and stops with the fraud, the malice, and the oppression, then there will be no punitive damage awards to pay. The cost of insurance will not be affected because

operation of an insurance company (as would be the payment of personal injury awards in malpractice cases).

Obviously, the way to keep the cost of insurance down to the public and at the same time encourage payment of due benefits is to make the management responsible.

Nobody pays a fine unless the law is broken. For one to suggest that punitive damage awards will be unbearable to the insurance company is a sad commentary on that insurance company's practices and suggests that the insurance company has entered into the wrong field of corporate enterprise.

B. The Second Standard of Damage Review Is the Nature of the Wrongful Acts.

The legally malicious and wrongful acts sued upon can be as varied as letting out the air of a neighbor's tires or shooting them out with a rifle while the neighbor is in the car. These two acts are qualitatively and quantitatively distinguishable, from which different amounts of damage would necessarily flow.

Similarly, the wrongful act might involve lower echelon people with limited discretion, acting upon sudden impulse, where in other cases the wrongful act might involve deliberate, manipulative, grossly unconscionable exercises of discretion which result in an oppressive denial of plaintiff's rights over a prolonged period of time. *Schroeder v. Auto Drive Way Company*, 11 Cal.3d 908, 921, 114 Cal.Rptr. 622, 631; *Ferraro v. Pacific Finance Corporation*, 8 Cal.App.3d 339, 87 Cal.Rptr. 226, 231; *G. D. Searle and Company v. Superior Court*, 49 Cal.App.3d 22, 122 Cal.Rptr. 218; *Toole v. Richardson-Merrell*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398; *Sturges v. Charles L. Harney, Inc.*, 165 Cal.App.2d 306, 331 P.2d 1072.

The evidence clearly shows that the actions of Mutual of Omaha occurred over a long period of time from the time

Egan was initially injured through McEachen's November 1970 visit calling him a fraud through receipt of the April 15, 1971 claims form showing disability due to accident, through actual conversion of his accident to sickness, through the ignoring of the California Insurance Commissioner's inquiries over a space of a year and a half. Clearly, McEachen and Segal, the corporate managers, were of a completely different category than June Bush, a lowly clerical employee flown from Omaha by Mutual to say she recognized her initials on the claims file jacket.

C. The Third Major Standard on Damage Review Is the Wealth of the Defendant.

This is a constitutionally definite standard, capable of determination down to the finest double entry decimal point. *Bertero v. National General Corporation,* 13 Cal.3d 43, 65, 118 Cal.Rptr. 184, 200; *Forte v. Nolfi,* 25 Cal.App.3d 656, 689, 102 Cal.Rptr. 455, 477. This prinicple of evaluation recognizes that the same malicious act done in the one instance by a poor person, and in the second instance by a wealthy person, may warrant a different penalty, which penalty shall be weighed against the wrongdoer's net worth. *Ferraro v. Pacific Finance,* 8 Cal.App.3d 339, 349, 87 Cal.Rptr. 226, 231-232.

Thus it is that a $500.00 penalty may be adequate punishment for a man with assets of $3,000.00 and a net worth of $1,000.00, whereas the application of the same 50% standard of taking of net assets may be excessive when applied to a wealthy corporation, especially viewed in relationship to the other applicable standards. Certainly, where the award amounts to only a fraction (less than 2%) of the company's total assets, it cannot be held to be constitutionally excessive. *Horn v. Guarantee Chevrolet,* 270 Cal.App.3d 477, 484, 75 Cal.Rptr. 871, 876.

D. The Fourth Major Standard of Judicial Review Is a Comparison of the Award With the "Earnings" of Appellant.

In the present instance, the net earnings of Mutual of Omaha for the year just prior to the award of the jury in this particular case was in excess of $22 million dollars. Comparison with the earnings of the defendant is absolutely proper. *Wetherbee v. United Insurance Company of America,* 18 Cal.App.3d 266, 271. The tax effect is interesting.

Starting from appellee Egan's side, the United States Supreme Court in the case of *Commissioner of Internal Revenue v. Glenshaw Glass Company,* 348 U.S. 426 held that punitive damages are taxable. The Court stated:

> "The common question is whether money received as exemplary damages . . . must be reported by a taxpayer as gross income under . . . the Internal Revenue Code . . . The Commissioner determined a deficiency claiming as taxable the entire sum less only deductible legal fees . . . Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion . . . We would do violence to the plain meaning of the statute . . . were we to say that the payments in question here are not gross income."

Thus, the proceeds as to Egan are taxable. At the rate of 70% federal income tax because the punitive damages would represent "unearned income". Additionally, the State of California exacts 10% maximum taxes on the award.

Therefore 80% of the Money Goes Back to the General Public in the Form of Taxes.

Consequently, appellant is ill-equipped to claim that the appellee Egan has received a windfall. In essence, he has brought a taxpayers suit on behalf of the general public, including Mutual of Omaha policyholders, who otherwise would never see any cash payments from Mutual.

Likewise, the Court may take judicial notice that under the Internal Revenue Code the corporate tax structure is approximately 50% and that payments of judgments, as well as attorneys fees incurred arising out of business-related purposes are fully deductible from gross income. Therefore, keeping in mind the 50% tax rate on corporate earnings, Mutual would be out of pocket only $1.25 Million Dollars. The award is not repugnant to the Constitution.

E. The Fifth Standard of Judicial Review Is the Comparison Between Actual Damages and Punitive Damages.

Once again, we have an objective basis of comparison. In fact, the standard of review is so easy of application that there has been a temptation to develop it as a sole slot-machine-like answer to all cases. It is so definite and easy of application that some courts have given into the temptation, and sometimes with disastrous results. The fact that this standard must be used in connection with the other standards is clearly demonstrable since the cases will run the gamut from a man shooting at cars on a roadway, causing possible serious injury and a $1.00 flat, to the same man causing the same flat tire by letting the air out of his neighbor's tires while the neighbor sleeps.

Would the 2,000:1 ratio of *Finney v. Lockhart,* 35 Cal.2d 161, 217 P.2d 19, 21, cover the damage done in both cases? Certainly, the 200:1 ratio of the *Wetherbee, supra* decision would in no way be adequate to cover the first course of conduct where the threat of death coincided with the advent of the same $1.00 in compensatory damages. Depending on the other facts in a given case, the ratio is, at best, only one of the guidelines to be used. It has its uses, but such ratios can no more be the single automatic criterion of review than can the standard insurance adjuster's settlement ratio of ''three to one'' general to special damages be an answer to all cases in a personal injury field. Such a single standard, while certain, cannot become the automatic standard of appellate review of jury decisions. *Bertero v. National General Corp.*, 13 Cal.3d 43, 65, note 12, 118 Cal.Rptr. 184, 200, note 12.

F. The Sixth and Final Standard of Judicial Review Is the Verdict Comparison Standard.

This standard obviously cannot be used by the jury, but only by an appellate court. It is used with caution.

The problem with using such a standard on review is that the only argument that can be made is that the award is ''too high'' or ''too low'' — but how? where? The other standards are really the more intellectually probative ones.

What is high in one jurisdiction may be low in another. In a new area of tort law, where the awards have been developing for a few short years, it is almost impossible to get any meaningful comparison on some ''absolute amount'' basis. Times, social needs, policies of industries, and money values will necessarily all operate to defeat any such absolute standard; but admittedly, this standard, too, is there to be used by the reviewing court together with the other five standards. The cases impose upon use of this particular appellate standard the requirement that such review occur with great respect for the opinion of the jury in this area and that it be done with great deference to the opinion also of the trial judge. The cases indicate that it be avoided if there is substantial evidence to support the award. *Bertero, supra; Finney v. Lockhart, supra; Wetherbee, supra; Horn v. Guaranty Chevrolet, supra.*

Appellant Mutual of Omaha Is a Fidiciary to Appellee Michael Egan, and Must Fairly Investigate His Claim.

As is evident from the tenor of the California Supreme Court opinion, it considered the securing of policy benefits to injured and disabled policyholders to be of prime public policy for the courts of the State of California. As pointed out, *supra*, the inability of the Department of Insurance for

the State of California to effectively secure redress to individual policyholders for individual wrongs reinforces the need for effective private litigation.

The appellant would lead the Court to believe that the duty of an insurance company to serve its policyholders by investigating their claims is a new, novel and unique proposition of law to the State of California that never existed prior to the *Egan* decision.

From the earliest days, the courts of the State of California have followed the holding of the United States Supreme Court in the case of *German Alliance Insurance Company v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 620, 58 L.Ed. 1011 which was expressly adopted in California in the case of *Caminetti v. State Mutual Life Insurance Company*, 52 Cal.App.2d 321, 126 P.2d 165, 168 which stated:

> "To the contention that the business is private, we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories for the money of the insured, possessing great power thereby, and charged with great responsibility."

Subsequent to the *Caminetti* case the California Supreme Court in the 1940's in *Bollinger v. National Fire Insurance Company*, 25 Cal.2d 399, 154 P.2d 399, 406 squarely

placed the burden of a fiduciary duty upon insurance companies as to its insureds.

Everytime the question has come before the court it has held that insurers are fiduciaries to their insureds growing out of the contractual relation, owing the highest standard of fair dealing to them, including the duty to affirmatively take action to disclose to them the basis of their decisions. *Nelson v. Abraham*, 29 Cal.2d 745, 177 P.2d 931, at 934; *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566, 108 Cal.Rptr. 480; *Delos v. Farmers Insurance Company*, 93 Cal.App.3d 642, 155 Cal.Rptr. 843, and *Egan* are just some of the cases that have so held. All of them recognize the inherent purpose common in disability funds to be that they

> "be liberally construed to promote their beneficent purpose (citation omitted) . . . to protect the reasonable expectations of those whose reliance is induced that underlie the rules of construction in favor of the insured in insurance cases and in favor of the party of reduced bargaining power in cases involving other standardized insurance contracts. . . . Another [purpose] is to provide subsistence. . . ." *Bellus v. City of Eureka*, 69 Cal.2d 336, 71 Cal.Rptr. 135, 144.

Appellant Mutual's claim that prior to *Egan* there was no duty upon an insurance company to investigate the claims of its insured lie ill in its mouth. More than a year before Mutual's perpetration of its calculated acts to deprive Egan of his benefits, the California Supreme Court had decided the case of *Barrera v. State Farm Insurance Compamy*, 71 Cal.2d 659, 79 Cal.Rptr. 106, 109, 113, 114 and 119, where it stated:

> "We conclude that an automobile liability insurer must undertake a reasonable investigation of the in-

sured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. . . . [This is] [b]ecause of the 'quasi-public' nature of the insurance business and the relationship between the insurer and the insured (footnote omitted), the rights and obligations of the insurer cannot be determined solely on the basis of rules pertaining to private contracts negotiated by individual parties of relatively equal bargaining strength. . . . the reasonable expectation of both the public and the insured is that the insurer will duly perform its basic commitment: To provide insurance. . . . [defendant's claims] would frustrate the purpose of the imposition of a duty upon the insurer to undertake a reasonable time from the acceptance of the application and issuance of the policy.''

Defendant Mutual had ample warning both from *Barrera* and other cases as to its required standard of conduct. (*Crisci v. Security Insurance Company of New Haven*, 66 Cal.2d 425, 58 Cal.Rptr. 13; *Comunale v. Traders and General Insurance*, 50 Cal.2d 654, 328 P.2d 198; *Montoya v. H.C. Moore and Mutual of Omaha Insurance Company*, 7 N.Mex. 326, 422 P.2d 363, and *Gray v. Zurich Insurance Company*, 55 Cal.2d 263, 54 Cal.Rptr. 104.)

In this particular case many amicus briefs were filed in the courts below, most by the insurance industry. By the time one finishes with these amicus briefs, it becomes evident that the dispassionate approach of Henry Kissinger has simply been a role played; in reality these briefs are not amicus to the court, but amicus to the insurance industry.

The general tenor of these briefs is that insurance companies should not be liable for punitive damages because of the great public need they serve by supplying benefits to injured people. Their position is that their acts, no matter

how malicious, should not be judged. The cry is that public service demands that they be free from ''harassment'' and the threat of the punitive damage lawsuit.

But as noted by the California Supreme Court this is an unsound propostion — because of the varied role they play in society they should be subject to punitive damages when they callously overstep their legitimate bounds.

The California Supreme Court notes that an insurer who has adopted willingly the fiduciary's role should not be given the license of corporate irresponsibility.

Directly and logically the Supreme Court of California simply held that managerial agents who can spend the corporate money, who can deny claims, who can allow claims, and handle the majority of the population of the State of California should not be allowed to consciously decide in advance that the policyholders' benefits will be cut off because they have decided to deem a fall from a roof to be a ''sickness'' rather than ''an accident.''

Conclusion.

The California Supreme Court has held punitive damages constitutional in the case of *Bertero v. National General Corporation*, 13 Cal.3d 43, 118 Cal.Rptr. 184; *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398; *Fletcher v. Western National Insurance Company*, 10 Cal.App.3d 376, 89 Cal.Rptr. 78, and *Wetherbee v. United Insurance of America*, 265 Cal.App.2d 921, 71 Cal.Rptr. 769.

Carried to its logical extremes, appellant should be arguing that the award of general damages of approximately $78,000 made to appellee herein should likewise be declared unconstitutional as void for vagueness. After all, the jury was instructed in even less definite standards and California Appellate Courts exercise even less control over awards of

general damages than they do punitive damages. In fact, the standard instruction to the jury is, according to the Book of Approved Jury Instructions (14.13):

> "No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering . . . in making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence."

Yet appellant does not make this claim — the shallowness of its position clearly shows through considered in this context.

In conclusion, this case should be dismissed for lack of a timely raised substantial federal question, let alone one created by an invalid statute. The constitutionality of punitive damages has been considered numerous times by the California Supreme Court, both in light of California State Constitutional, and Federal constitutional principles. Punitive damages have been found to serve valid public policies.

The same result should occur here that occurred in *Hicks v. Miranda*, (1975) 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 the Court held:

> "We are not obligated to grant the case plenary consideration and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one."

Dated: February 7, 1980.

Respectfully submitted,

STEPHEN L. ODGERS,

Attorney for Appellee Michael Egan.